Global Business & Development Law Journal

Volume 4 | Issue 1 Article 11

1-1-1991

GATT: An Opportunity for an Intellectual Property Rights Solution

Jean M. Dettmann

University of the Pacific, McGeorge School of Law

GATT: An Opportunity for an Intellectual Property Rights Solution

TABLE OF CONTENTS

I. INTRODUCTION

New ideas, technologies, innovative products and other efforts of human creativity are considered intellectual property. The importance of development and use of products embodying intellectual property has increased dramatically. The growing share of knowledge-intensive products in worldwide trade together with the increase in international technological competition, copying devices, and integrated communication abilities have magnified the economic significance of intellectual property.[1]

In an effort to protect intellectual property creations, many countries devise regimes which govern the ownership and use of intellectual property. Copyright laws,[2] patent laws,[3] trade secrets,[4]

1. Braga, *The Economics of Intellectual Property Rights and the GATT: A View From the South*, 22 VAND. J. TRANSNAT'L L. 243, 254 (1989) [hereinafter Braga].

2. "Copyright laws protect the representation of ideas, namely literary and artistic works from unauthorized distribution or publication. A copyright automatically exists upon authorship of works, such as books, recordings, and more recently, computer programs. Copyrights are transferable and allow the owner to extract a fee, or royalty, for reproduction or performance of the copyrighted work. The duration of the protection is typically fifty years after the author's death or, in cases where there is no author, fifty years after original publication." Heritage Foundation, *New Threats to Intellectual Property Rights*, 761 BACKGROUNDER 3 (1990) [hereinafter *New Threats*].

3. *Id.* at 4. "A patent is a government's legal guarantee that the patented invention can be produced, sold, utilized, or imported only with the explicit authorization of the patent holder. Patents are granted for inventions that are new and commercially useful." *Id.*

4. *Id.* "Trade secrets are usually protected by contractual agreements and are used largely for ideas or inventions too sensitive to be patented, since patents requires disclosure of creative product or idea to the government granting the patent." *Id.*

and trademarks[5] grant innovators supreme rights to their creations for a specified period of time.[6] The specified period of exclusivity allows innovators and creators time to earn a return on the time and money invested in developing their ideas. The monetary return is needed to replenish funds expended and provide a chance to profit. Intellectual property regimes, in theory, include provisions that protect the creators and manufacturers against the abuse of their rights and allow intellectual property developers time for monetary recovery.[7] However, if the protection of the intellectual property regimes is inadequate or ignored, the inventors and developers are unable to achieve the return necessary to encourage continued innovation and creativity.

Consequently, intellectual property and its protection have become fundamental to the growth and stability of many countries. Developed and developing countries alike recognize intellectual property as becoming a factor that distinguishes the prosperous and strong nations from the weak ones.[8] This economic significance of intellectual property, particularly its growing impact on trade, is the focus of many studies and has sparked debates among the countries of the world.[9]

First, Part II highlights the growing ineffectiveness of current intellectual property protections, and discuss the detrimental consequences of continued ineffectiveness. This comment then explains why measures presently available to correct the problem are inadequate. Part III subsequently endorses the application of the General Agreement on Tariffs and Trade (GATT) as the more efficient and proper means available to curb the inadequacies of

---

5. *Id.* "Trademarks are any sign, word, design, letter, number, color, or shape that distinguishes one product from another. The shape of a Coca-Cola bottle, as well as the name, is a trademark." *Id.*

6. For example, patents secure to an inventor for a term of years the exclusive right to make, use, or sell an invention. WEBSTER'S THIRD WORLD NEW INTERNATIONAL DICTIONARY 1654 (unabridged 1981).

7. Greenwald, *The Protection of Intellectual Property Rights in the GATT and the Uruguay Round: The US Viewpoint*, in CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 239 (Rubin & Jones ed. 1989) [hereinafter Greenwald].

8. Braga, *supra* note 1, at 254.

9. *Id.*

current intellectual property protection.[10] This paper focuses on the instruments within GATT, its willingness to deal with the unfair trade issue, and the recent attempt by signatories to reach a GATT agreement. Integrated throughout, the comment discusses the conflict between developed and developing countries which disagree on the appropriateness of increasing intellectual property protection. This comment concludes that an effective multi-national intellectual property agreement under GATT is possible, but only if developing countries secure a better chance to be heard.

II. INTELLECTUAL PROPERTY PROTECTIONS PROBLEMS & EFFECTS

A. Developed Countries

1. Developed Countries' View of the Problem

With the ever-increasing costs of product innovation, creation, and marketing, the recovery of expenses is essential for developing the next generation of products and services. Many industrialized countries claim that an economic return commensurate with the costs expended by companies and individuals is more difficult to achieve today.[11] They maintain that competitors, who do not face similar developmental expenses, copy and sell the product at a much lower cost.[12] Industrialized countries declare that this on-going encroachment, or frustration of intellectual property rights is unfair, because it effectively displaces legitimately produced works

10. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

11. Statement of Views of the European, Japanese and United States Business Communities, *Basic Framework of GATT Provisions on Intellectual Property*, Feb. 11, 1988, ICC Doc. No. 450/623 Rev. 2, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 357, 363 (Beier & Schricker ed. 1989) [hereinafter Statement of Views].

12. *See id.* Looking at Thailand's market as an example, "the price of a video copied legitimately is around 300 baht including a copyright fee of between 60 and 70 baht, while a street-side pirated version costs about 150 baht - or less in bulk." Financial Times, Dec. 6, 1990, at 3, col. 8. Baht is the basic monetary unit of Thailand. *See* WEBSTER'S THIRD WORLD NEW INTERNATIONAL DICTIONARY 168, 1458 (unabridged 1981).

from international markets.[13] Many countries point to inadequate protection of and compliance with intellectual property rights as the main factor compounding this inequity.

2. *Effects of Ineffective Protection*

Developed countries report that ineffective intellectual property protection has resulted in extensive and increasing erosion of their markets and profits. Deficient protection adversely affects the U.S.; a deep concern has grown out of its lost competitiveness in world markets as evidenced in the report *Global Competition-The New Reality*, submitted in October 1984 to President Reagan.[14] The study reveals that the U.S. lead in high technology is declining. It professes that high technology innovations are the only means to maintain the market position that the U.S. industry holds worldwide. Improved protection of domestic and international intellectual property constitutes a necessary support towards this end.

The injury to worldwide industry as a result of ineffective protection of intellectual property is compelling evidence of the magnitude of the problem. This injury is often illustrated by figures representing lost sales, jobs and earnings. In response to a recent questionnaire of the U.S. International Trade Commission, 193 U.S. firms estimated their aggregate worldwide losses due to inadequate intellectual property protection at $23.8 billion in 1986 or 2.7% of sales affected by intellectual property.[15] Estimates of worldwide losses to all of U.S. industry in 1986 from inadequate foreign protection of intellectual property range from $43 billion to $61 billion.[16] Losses to industries dealing in U.S. movies, music works, books, and software are estimated to be $4.17 billion in 1990.[17] Outside of the U.S., a study by a panel of U.S., European

13. Statement of Views, *supra* note 11, at 363.

14. President's Commission on Industrial Competitiveness in GLOBAL COMPETITION-THE NEW REALITY (1985).

15. *See* Statement of Views, *supra* note 11, at 362. *See also New Threats, supra* note 2, at 6.

16. *Id.*

17. 8 Int'l Trade Rep. (BNA) No. 8, at 274 (Feb. 20, 1991).

and Japanese industries reports an average of 100,000 jobs a year are lost in Britain alone due to patent and copyright violations.[18] The European Parliament estimated that losses sustained by British publishers from copyright infringements average about $216 million a year.[19] Additionally, the U.S., European and Japanese business communities complain that a disproportionate amount of time and resources are spent defending intellectual property owners and their rights.[20] As a result, there is a growing consensus among many nations that the inequitable invasion of innovators' rights is not simply a problem of intellectual property, but has substantially distorted worldwide trade.[21] Consequently, a key issue in international discussions is the protection of intellectual property and its trade-related aspects.

B. Developing Countries

1. Developing Countries' View of the Problem

Many developing countries do not share the view that the protection of intellectual property rights is both economically sound and necessary to alleviate distortion in world trade.[22] The economic objective of developing countries is to promote participation in the benefits from technological developments and scientific innovations on terms consistent with their needs and ideologies.[23] Developing countries consider the free flow of technology to be essential to their economic development. Therefore, they oppose action which might in any way impede the movement of technology, or of products based on foreign

18. Statement of Views, *supra* note 11, at 362. *See generally New Threats, supra* note 2, at 6 (discussing costs of inadequate intellectual property protection).

19. Financial Times, Dec. 1, 1988, at 5.

20. Statement of Views, *supra* note 11, at 361.

21. *Id.*

22. *New Threats, supra* note 2, at 2.

23. Yelpaala, *Third World Perspective on Technology Transfer*, in LICENSING AGREEMENT: PATENTS, KNOW-HOW, TRADE SECRETS AND SOFTWARE 207 (1988) [hereinafter Yelpaala, *Third World*].

technology or innovation.[24] Furthermore, some third world countries insist that knowledge and intellectual property are "the common heritage of mankind" or "*res communis*, "[25] and therefore, society may not impose any restrictions on the production, use or selling of inventions.[26] Rather, ideas, inventions, and technologies should be freely shared by all.

2. *Effects*

Despite these views, developing countries are strongly urged to join the general consensus in improving intellectual property protections since they too risk injury in the long term. Without adequate protections, industries are reluctant to commit to the development of the next generation of products, processes, and services in those countries.[27] This diminution in commitment results in the loss of new jobs, skills, and foreign investments that innovative firms supply.[28] Additionally, the loss of foreign investment prevents countries from attaining their own new research, development facilities, and manufacturing plants.[29]

III. SEARCHING FOR A SOLUTION

A. Past Proposed Solutions

Recognizing the injury caused by intellectual property right abuses, many countries are searching for a prompt, efficient and fair solution to the inadequacy of current intellectual property

---

24. Greenwald, *supra* note 7, at 238.

25. *See New Threats*, *supra* note 2, at 2. *See also* Yelpaala, *Third World*, *supra* note 23, at 233 (providing a definition of *res communis*).

26. Yelpaala, *Third World*, *supra* note 23, at 233. Additionally, to those underdeveloped countries that are marxist, communist and socialist, the concept of property is the antithesis of their view to abolishing private ownership. *See id.* at 227-28.

27. *New Threats*, *supra* note 2, at 6.

28. *Id.* at 5. *See* 7 Int'l Trade Rep. (BNA) No. 34, at 1306 (Aug. 22, 1990). "Without these laws, there's no incentive to do research and development [in developing nations]," stated Harvey Bale, Pharmaceutical Manufacturers Association senior vice-president of international affairs. *Id.*

29. Statement of Views, *supra* note 11, at 363. *See generally New Threats*, *supra* note 2, at 5 (discussing potential investors' attraction to improved intellectual property).

protection. Past solutions accent improving municipal and customs laws in individual countries and existing multiparty organizations and conventions, such as the Paris Convention for Protection of Industrial Property,[30] or the Berne Convention for the Protection of Literary and Artistic Works.[31] Unfortunately, these particular avenues have proven inefficient in tackling the complexity of the issues at hand.

1. Municipal Laws

The argument that improving municipal laws will help secure intellectual property rights is founded on the related notions of "National Treatment" (NT). NT, as implemented in the Paris Convention for Protection of Industrial Property,[32] requires signatory countries to treat individuals from a foreign country as they treat their own nationals.[33] Thus, a host country is obligated to give foreign visitors, and their property the same protection that its municipal laws give to its own citizens.

However, shortcomings of applying NT become obvious if the applicable municipal laws are themselves insufficient.[34] For example, the Paris Convention grants each signatory country the right to determine what is patentable. This means that each country creates its own specific intellectual property regime.[35] Thus, countries with the *res communis* ideology[36] have flexibility under the Paris Convention to enact very limited or even no laws

30. Paris Convention for the Protection of Industrial Property of March 20, 1883, *as revised* at Stockholm on July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923, 828 U.N.T.S. 305 [hereinafter Paris Convention] (recognizing the standards of patentability).

31. Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 828 U.N.T.S. 221 [hereinafter Berne Convention] (existing as one of the oldest and most prominent treaties protecting copyrights). The U.S. became a party to the Convention March 1, 1989, H.R. Doc. No. 609, 100th Cong., 2nd Sess. (1988).

32. Paris Convention, *supra* note 30.

33. Yelpaala, *Third World*, *supra* note 23, at 232.

34. Fikentscher, *GATT Principles and Intellectual Property Protection*, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 99, 114-15 (Beier & Schricker ed. 1989) [hereinafter Fikentscher].

35. Yelpaala, *Third World*, *supra* note 23, at 237.

36. *See id.* at 223.

recognizing patentability.[37] Consequently, NT creates a disparate level of protection in different countries. It does not ensure substantive equivalence. Thus, according to NT principles, a country with a high level of protection must grant this higher protection even to foreigners of countries with a lower level of protection. However, when citizens from the country with a higher level of protection visit the country with a lower level of protection, they must settle for the lower protection of that country.[38] In many situations, NT only provides a foreigner with inadequate protection from the host country's municipal laws.[39] Thus, municipal law coupled with NT does not offer an effective solution to the distortions of intellectual property trade.

2. Customs Laws

Customs laws, which regulate the flow of goods over borders, could help limit the circulation of unfairly obtained products into some countries. The attempt to use customs laws, similar to the attempt to use municipal laws, is effective only if adequate laws uniformly exist. However, since most countries are free to set their own border regulations, countries desiring free flow across their borders are able to set minimum restrictions. This leads to disparate levels of protection between countries. Even if created or improved, customs laws alone do not solve the problem if infringements originate within the country's borders.

37. *Id.* at 237.

38. Katzenberger, *General Principles of the Berne and Universal Copyright Conventions*, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 45 (Beier & Schricker ed. 1989) [hereinafter Katzenberger].

39. Statement of Views, *supra* note 11, at 363.

3. Multiparty Organizations & Conventions

The World Intellectual Property Organization (WIPO), a specialized U.N. organization, has been for many years the only source of regulatory movement in intellectual property rights.[40] WIPO is the custodian of international conventions, like the Berne Convention[41] (copyrights), the Paris Convention[42] (patents), and the Madrid and Lisbon Agreements[43] (false source repression on goods, and protection of title of origin).[44] WIPO administers the Paris Convention which contributes to the level of intellectual property protection available today.[45]

However, this agency has fallen short of meeting intellectual property protection needs, especially in recent years. The extensive losses experienced by signatory countries confirm the inadequacy.[46] Signatories to the WIPO-administered conventions are bound to merely provide NT, which is branded ineffective. In addition, the obligation to grant NT established by the Paris Convention is interpreted by the signatories as precisely defined and closed.[47] Therefore, under WIPO, the treaty obligation to provide NT cannot extend to new objects of intellectual property not specifically mentioned.[48]

---

40. Art. 4 of the Convention Establishing World Intellectual Property Organization, July 19, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932, 828 U.N.T.S. 3.

41. *See* Berne Convention, *supra* note 31.

42. *See* Paris Convention, *supra* note 30.

43. Madrid, Agreement Concerning the International Registration of Marks of April 14, 1891, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 389, 201 W.I.P.O. 1983; Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, as revised at Stockholm on July 14, 1967, 264 W.I.P.O. 1976.

44. Braga, *supra* note 1, at 250.

45. Kretschmer, *The Present Position of The US, Japanese and European Industry*, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 93, 96 (Beier & Schricker ed. 1989) [hereinafter Kretschmer].

46. *See supra*, notes 22-29 and accompanying text discussing developing countries and the effects of ineffective protection.

47. Kunz-Hallstein, *The US Proposal for a GATT-Agreement on Intellectual Property and The Paris Convention for the Protection of Industrial Property*, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 75, 85 (Beier & Schricker ed. 1989) [hereinafter Kunz-Hallstein].

48. *Id.*

In addition, some signatories believe that dealing with significant shortcomings of municipal laws or their improper application is beyond WIPO's mandate.[49] Thus, if a country does not have a law protecting intellectual property rights, or if an existing law does not cover a certain technology, the Paris Convention cannot be used to force the creation of a protective law. Countries have already experienced difficulties in characterizing new technologies under the existing types of intellectual protection. Complications occur when new products are introduced, illustrated by the great difficulties that followed the developments of computer software and the semi-conductor chip.[50]

Developed countries also argue that even if the rules themselves provide sufficient protection, there is still no method of enforcement under WIPO or its conventions. Many argue that the most significant deficiency in the WIPO process is the absence of a meaningful system enforcing minimum standards of intellectual property protection.[51] This inadequacy impedes any existing protective treaty or convention.

Thus, the available avenues of national law, customs law, and the multiparty conventions that currently touch upon intellectual property do not effectively solve the growing unfairness of intellectual property trade. Not all countries have the same notion of proprietary rights and not all signatories have the same interpretation of their obligations. Even a more fundamental problem is that not all countries subscribe to WIPO or all of the conventions. Thus, these countries remain free of the convention rules that do persist. These ineffective alternatives to the problem have led many countries to create temporary solutions.

---

49. Kretschmer, *supra* note 45, at 96.

50. A wholly new intellectual property protection was created between the U.S., Japan, Sweden and the European Community due to the development of the semi-conductor chip. *See* Gadbaw & Richards, INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 5 (1988) [hereinafter GLOBAL CONSENSUS].

51. Kastenmeier & Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND.J. TRANSNAT. L. 285, 293 n.24 (1989).

B. Temporary Solutions

Frustrated by the deficiency of available solutions, governments across the globe are opting for unilateral remedies in order to eliminate trade distortions caused by inadequate protection of intellectual property.[52] As tariff walls have tumbled down through international negotiations, other less visible forms of protection have taken their place.[53] The U.S., as one example, has enacted several pieces of legislation such as The Trade and Tariff Act.[54] This act enables the President to consider the protection another nation affords to intellectual property when determining whether the foreign nation's actions are "unreasonable" for purposes of Section 301 of the Trade and Tariff Act (retaliation) or when determining a nation's Generalized System of Preferences (GSP) standing.[55] The European Community (EC) offers another example of unilateral movement. The EC has withdrawn GSP privileges and initiated proceedings under its commercial rules against Indonesia for record piracy.[56] Such measures often lead to bilateral negotiations between two countries at the opposite ends of the unilateral movement. Some of the bilateral negotiations are relatively successful in gaining improved intellectual property

---

52. *See GATT BRIEF: The American Connection,* ECONOMIST, Apr. 21, 1990, at 85-86 [hereinafter *American Connection*].

53. *Id.* at 85.

54. 19 U.S.C. § 2411(e)(4)(B) (1988). "Section 301 provides the President with the authority to seek the elimination of a nation's unjustifiable or unreasonable trade practices, where such practices burden United States commerce and authorizes the restriction of imports from that nation if such practices are not eliminated." GLOBAL CONSENSUS, *supra* note 50, at 6 n.8.

55. *See* Financial Times, Dec. 6, 1990. at 3, col. 8. (discussing the International Intellectual Property Alliance's filing of a Section 301 petition in late 1990 seeking an investigation and possible retaliation of alleged copyright abuses in Thailand). For example, the U.S., dissatisfied with ongoing piracy in several south east Asian countries, did not wait for the problem to be solved under the international treatment principle of the Berne or UC Convention and turned to domestic trade sanctions. "The results were . . . 'amazing.' Within a relatively short time, Taiwan, Malaysia, Singapore, and South Korea enacted or amended general copyright legislation." Dreier, *National Treatment, Reciprocity and Retorsion--The Case of Computer Programs and Integrated Circuits,* in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 63, 68 (Beier & Schricker ed. 1989).

56. Statement of Views, *supra* note 11, at 364.

protection, especially for developed countries.[57] However, each accomplishment resulting from bilateral talks raises other frustrations.

Although industrialized countries prefer unilateral actions to no protection improvements at all, both developed and developing countries have their own reasons for disliking this unilateral approach. Both developed and developing countries agree it is an imperfect solution. Developed countries hesitate in using these methods because they fear that a hard-won victory with one nation under one bilateral negotiation sets the limits for future negotiations with another country.[58] Furthermore, other countries may take advantage of the successful outcome of improved protection only after the concessions by the negotiators are granted.[59] These limitations of the approach have forced policymakers, particularly those in the United States, to search for an answer in a new multilateral convention. Developing countries have continued to oppose addressing intellectual property rights, services, or even trade-related investment issues in the context of a multilateral convention. Despite this reluctance, developing countries, which do not stand with equal bargaining power, will be the most disadvantaged if developed countries continue to lead the rest of the world into a more tightly-managed set of bilateral trade relationships.[60] U.S. trade officials admonished that "until adequate international rules exist for the $1 trillion of trade that now goes undisciplined . . . [their government] will continue to use sanctions or the threat of sanctions . . . ."[61] If the countries of the world do not reach a solution, these initiatives to protect intellectual property could become the norm and result in new barriers to legitimate trade.[62]

---

57. *See* GLOBAL CONSENSUS, *supra* note 50, at 23 n.22. The Republic of Korea, Singapore, and Taiwan (three of the top five GSP beneficiary nationals under the U.S.) have all made genuine efforts to provide a greater level of intellectual property protection. Mexico was poised to provide significantly improved patent protection. *Id.*

58. *Id.* at 29.

59. *Id.*

60. *Id.* at 48-49.

61. *American Connection, supra* note 52, at 86.

62. Statement of Views, *supra* note 11, at 364.

C. Finding a Real Solution: GATT

In the hope of finding an efficient multilateral convention to solve the intellectual property protection deficiency, both developed and developing nations have turned to GATT. After World War II, an international contingency attempted to establish a specialized agency of the U.N. which would provide institutional machinery designed to "reconstitute the pre-war economic and monetary system with due safeguards against the defects which had militated against free trade."[63] The agency was to be named the International Trade Organization (ITO). Disagreements prevented ITO's formation, but as a result of those unsuccessful efforts, GATT was created.[64] GATT took effect on January 1, 1948,[65] and "provides treaty mechanisms for the establishment and the maintenance of a common code of conduct for international trade."[66] It provides machinery for the stabilization and the progressive reduction of tariffs, and a forum for regular consultation and periodic negotiating rounds between its participants. GATT also supplies a structure and procedure for the conciliation and settlement of disputes so as to protect and secure a balance of interests between contracting parties.[67] The agreement remains the most comprehensive instrument of international law regulating international trade.[68] Consequently, many countries believe that GATT is a viable means to attaining effective intellectual property protection.

---

63. K. SIMMONDS & B. HILL, LAW AND PRACTICE UNDER THE GATT, IV. 1 (1989).
64. *Id. See generally* Fikentscher, *supra* note 34, at 101-02 (discussing GATT's creation).
65. *Id.*
66. SIMMONDS & HILL, *supra* note 63, at 1-2.
67. Fikentscher, *supra* note 34, at 101.
68. *Id.*

1. Quieting Potential Problems

a. GATT Compatibility with IPP

GATT currently makes few references to intellectual property. As negotiated in the 1940s, GATT only contained two provisions involving intellectual property: Article IX,[69] which discusses "marks of origin" and Article XX,[70] which mentions patents and copyrights in discussing measures for securing compliance.[71] Consequently, one eminent question is whether the framework of rules and negotiating procedures of GATT can be applied to the improvement and protection of intellectual property rights. The answer experts most often espouse is that GATT is primarily a contract among its members, and, as a contract, it can be extended to cover anything its members choose.[72] Further, GATT rules already allow member nations to protect intellectual property rights at their borders.[73]

Underlying GATT is a guarantee of free and undistorted trade. The proponents of intellectual property protection do not seek a granting of rights. Rather, they seek distortion-free trade of recognized goods. Arguably, intellectual property is like any other tradeable good. It has its own intrinsic value. The difference is intellectual property represents the "commodity of ideas."[74] Under GATT, if a consensus exists that the failure to protect intellectual property rights is distorting the patterns of international

---

69. *See* SIMMONDS & HILL, *supra* note 63, at 1-2. "Article IX covers marks of origin and is designed to deal with country of origin mislabeling and abuse of marking requirements." *Id.*

70. *Id.* GATT Article XX(d) provides in relevant part that "nothing in the Agreement shall be construed to prevent the adoption or enforcement of measures . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including . . . the protection of patents, trademarks, and copyrights, and the prevention of deceptive practices." *See* GATT, *supra* note 10.

71. Statement of Views, *supra* note 11, at 365.

72. GLOBAL CONSENSUS, *supra* note 50, at 43. "There is no inherent institutional reason why the GATT cannot take up the issue of intellectual property rights for the purpose of elaborating rules that reduce or eliminate the distortions caused by the lack of protection or lack of coordinated international enforcement." *Id.*

73. *Id. See* GATT, *supra* note 10, at art. XX(d).

74. Yelpaala, *Third World*, *supra* note 23, at 223.

trade, members may clarify and expand GATT rules to deal with the problem at its source, namely the intellectual property regimes.[75] GATT, therefore, provides the opportunity to evaluate intellectual property protection not simply as a technical legal question, but as an economic trade issue. The agreement places intellectual property in the context of trade concessions: countries exchange access to their markets for access to the markets of others.[76]

b. Contractual Nature of GATT

GATT puts intellectual property regulation entirely into a negotiating process: to obtain concessions from one GATT member the receiver offers something in return.[77] In light of this arrangement, some developing countries complain that they are asked to make new concessions in the area of intellectual property without receiving anything in return. However, U.S. and other countries counter such complaints by invoking Article XXIII of GATT.[78]

---

75. GLOBAL CONSENSUS, *supra* note 50, at 43.

76. *Id.* at 52.

77. Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223, 230 (1989).

78. GATT Article XXIII, *Nullification or Impairment*, reads in part:

> 1. If any contracting party should consider that any benefit accruing to it directly under this Agreement is nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it. 2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES . . . .

Atlantic Council of the United States, GATT PLUS-A PROPOSAL FOR TRADE REFORM WITH THE TEXT OF THE GENERAL AGREEMENT 137-38 (1975) [hereinafter GATT PLUS].

Article XXIII permits a contracting party to claim a nullification or impairment of rights as a result of either a violation of GATT or any other measure that has the effect of denying a party the rights for which it has bargained.[79] Developed countries argue that all GATT negotiations are based on the expectation that the value of their past concessions would not be undermined.[80] Clearly, if continued abuse of intellectual property rights were not within reasonable expectations of the party, the value of the concessions would be seriously impaired. Developed countries further support the impairment stance by pointing out that in original GATT negotiations only a nominal percentage of exports were tied to intellectual property.[81] Overall, the volume of world trade in goods has grown ten-fold since GATT's conception "rising by 6% a year since 1983."[82] Industrialized countries use these percentages to show complaining members that interests and expectations are changing on both sides of the table. Consequently, developed countries believe these impairments, not taken into account originally, are a form of concession they can use in current negotiations.

2. *The Instruments of GATT*

The instruments available within GATT may aid in obtaining a solution in the area of trade-related aspects of intellectual property protection (TRIPs). In particular, the tools used to reach fair and efficient results are the broad framework of GATT and its theories of the Most-Favored-Nation (MFN) and National Treatment.

a. Broader Framework

Having focused their discussions solely on intellectual property, WIPO members have attained minimal results. Under GATT,

---

79. Gadbaw, *supra* note 77, at 231.

80. *Id.* at 232.

81. *See id.* (stating that less than ten percent of U.S. exports were tied to intellectual property when GATT emerged).

82. *American Connection, supra* note 52, at 85.

countries negotiate problems in the broader context of "trade policy." This broader framework improves the chances for success, since it allows trade-offs and leverage situations.[83] Intellectual property is just one of fifteen areas recently reviewed.[84] Since countries negotiate for items, such as agriculture and textiles, in addition to intellectual property protections, countries may be willing to make concessions in the area of intellectual property for other gains. The variety of items negotiated enhances the chance of reaching compromises, and subsequently a solution.[85] As a result, developing countries as well as the developed countries are more likely to conclude negotiations believing that a fair result has been obtained.

However, this broader context of negotiations may have its disadvantages. In order for a GATT Round to effectively conclude, parties contend that agreement must be reached in all the areas of negotiations. Therefore, although the parties may agree as to intellectual property protections, they may reach a stalemate over another item, like agriculture or antidumping. A stalemate in one area of the GATT Rounds may risk the success of the whole Round, and any accomplishments in intellectual property protections negotiations.[86]

---

83. Kretschmer, *supra* note 45, at 96.

84. The fifteen items of the Uruguay Round include: intellectual property; agriculture; textiles and clothing; natural resource-based products; services; tropical products; disputes settlement; investment measures; tariff; non-tariff measures; subsidies and countervailing measures; safeguards; GATT codes; GATT articles; and functioning of the GATT system. *See American Connection, supra* note 52, at 86.

85. Joos & Moufang, *Report on the Second-Ringberg Symposium*, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 1, 25 (Beier & Schricker ed. 1989).

86. The ministerial meeting in Brussels of early December 1990 was supposed to finalize the four-year Uruguay Round efforts. However, the U.S. and European Community failed to agree on a reduction in farm subsidies. As a result, the whole GATT effort, including the labor of the other 14 areas, temporarily stalled. *See* Financial Times, Jan. 15, 1991, Survey §, at II. *See also infra* note 97 and accompanying text (discussing recent developments in overcoming farming disagreements).

b. Most-Favored-Nation Combined with National Treatment

Another attribute of GATT is its juxtaposition of Most-Favored-Nation with National Treatment. MFN and NT complement each other as devices for assuring free world trade. Under MFN,[87] any advantage granted by a GATT Contracting Party to any other country must be granted to all GATT Contracting Parties.[88] Thus, MFN provides equal treatment for all international trading parties so designated.[89] The MFN clause requires a government to treat all foreign goods equally, but domestic goods might be favored. NT prevents this discrimination between domestic and foreign products.[90] NT binds the Contracting Party to treat foreign imported goods as if they were domestic goods. Thus, NT is the

---

87. *See* GATT Article I, General-Most-Favored Nation Treatment stating:

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT PLUS, *supra* note 78, at 100.

88. Fikentscher, *supra* note 34, at 114. "Most-favored-nation treatment is a special application of the even broader principle of non-discrimination: If an act of discrimination should be committed against a commercial partner of a GATT Contracting Party, this Party is bound, under the international law of the GATT Agreement, to remedy this discrimination, if the affected partner is another GATT Contracting Party." *Id.* The other GATT principles, such as anti-dumping measures and subsidies control can be derived from the MFN treatment. *Id.* at 103.

89. *Id.* at 103.

90. GATT Article III, National Treatment states:

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations, and requirements affect the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products . . . .
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . . .

GATT PLUS, *supra* note 78, at 104.

necessary counterpart to MFN treatment.[91] Together, both principles maximize free world trade by tentatively creating identical market conditions, irrespective of national boundaries.[92]

c. Codes

Another special feature of GATT is the procedural ability of members to form a lateral agreement aside from a general GATT resolution when countries cannot unanimously agree on an issue. This separate agreement is termed a code. A code format provides interested parties with an opportunity to form a separate, more detailed agreement in combination with, or in lieu of, a less demanding agreement. Countries participate in establishing a code voluntarily, so only members that sign a particular code are held to the stricter standards that it might contain.[93]

d. GATT's Willingness to Deal with Unfair Trade

GATT's tools of a broader framework, the combination of MFN and NT and codes bring hope to the search for a solution to the intellectual property debate. Because GATT has successfully eliminated many tariffs hindering trade, its members increasingly turn their attention to "nontariff barriers" to trade. Referring to all forms of governmental intervention other than the ordinary tariff, nontariff barriers are designed to tip the scales of international competition in favor of the domestic consumer or producer.[94] Nontariff barriers include the unilateral and bilateral steps that the industrialized countries take to quash intellectual property right encroachments. Focusing on nontariff barriers has expanded the scope of GATT's work into domains previously reserved to domestic policy-making.[95]

---

91. In comparison, the conventions under WIPO lack this important combination.
92. Fikentscher, *supra* note 34, at 114-15.
93. 7 Int'l Trade Rep. (BNA) No. 34, at 1306-07 (Aug. 22, 1990).
94. GATT PLUS, *supra* note 78, at 45.
95. GLOBAL CONSENSUS, *supra* note 50, at 29.

Since unilateral and bilateral movement are inherently unfair to developing countries which have little power in this area, GATT discourages these efforts. These activities also establish new regimes that favor only a few countries. This effect is contrary to GATT's goal of distortion-free trade. Consequently, since many find the current status of intellectual property protection leading to unfair trade results, and even more agree that growing nontariff barriers are detrimental to free trade, GATT members are willing to tackle the issue of intellectual property.

D. The Current GATT Round

Frustrated by the ineffectiveness of the conventions under WIPO to resolve the intellectual property issues, and realizing that GATT may be the answer for improving intellectual property protection, GATT members have included the issue of intellectual property in the latest GATT Round, the "Uruguay Round."[96] Signed in 1986, the "Ministerial Declaration on the Uruguay Round," authorizes a GATT committee to deal with trade-related aspects of intellectual property.[97] Trade ministers of 100 member countries, and seven aspirants, participate in this four year-old negotiation effort. These

---

96. The Uruguay Round is named after the 1986 opening conference held in Puntal del Este, Uruguay.

97. The Declaration states:

> In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.
>
> Negotiations shall aim to develop a multilateral framework of principles, rule and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT. These negotiations shall be without prejudice to other complementary initiative that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.

GATT, Ministerial Declaration of Punta Del Este, of Sept. 20, 1986, *reprinted in* LAW AND PRACTICE UNDER GATT 111.A.3. (K. Simmonds & B. Hill eds. 1988).

ministers met recently in December 1990 in Brussels in an unsuccessful attempt to conclude this Round.[98]

1. Developing Countries and GATT

Developing countries had no unified position at the commencement of the new Round. Many developing countries, including those comprising the Association of Southeast Asian Nations (ASEAN), appeared willing to enter into negotiations.[99] While some nations demonstrate a willingness to include intellectual property in GATT discussions, they argue that the end product should reflect the developmental differences of their various countries.[100] Other nations, whose intellectual property laws are generally adequate, wish to include in the standard-setting exercise as many GATT signatory parties as possible, even if this means lower intellectual property standards.[101]

A minority of developing countries, however, resisted the initiation of the new Round. These developing countries, led by Brazil and India, have been reluctant to join in the intellectual property protection efforts for a number of reasons.[102] Many developing countries challenge the industrialized nations' view that a GATT solution will also benefit developing countries. Developing

---

98. *See* Financial Times, Dec. 8, 1990, at 1, col. 3. The December conference broke down after the Eurpoean Commission refused to meet demands from the U.S. and other nations in the area of agriculture. However, disagreement continued in the area of intellectual property as well. *Id.*

At the concluding session in December 1990, the ministers appointed Arthur Dunkel, director-general of GATT, who for weeks following the stall brokered numerous transatlantic discussions. The Uruguay Round was officially resurrected on February 20, 1991, when the European Commission finally agreed to demands of the US and others nations to negotiate "specific binding commitments." However, aware of the repeated failure to meet deadlines, Dunkel has been hesitant in setting any target date for completing this Round. *See* Williams, *GATT Talks Given the Kiss of Life,* Independent, Feb. 21, 1991, bus. sec. at 26 (LEXIS, Nexis file).

In the meantime, India is planning to host a conference for developing countries before the next ministerial meeting. The meeting is an attempt to evolve a common strategy on trade-related issues, like intellectual property. *See* Financial Times, Dec. 11, 1990, at 6.

99. Koh, *The GATT and the Uruguay Round of Multilateral Trade Negotiations: A Developing Nation Perspective,* in CONFLICT AND RESOLUTION IN US-EC TRADE RELATIONS AT THE OPENING OF THE URUGUAY ROUND 47, 50 (Rubin & Jones ed. 1989).

100.Kastenmeier & Beier, *supra* note 51, at 292.

101. *Id.*

102. Braga, *supra* note 1, at 259.

countries point out that if a resolution is passed in GATT that increases intellectual property protections they will face new royalties combined with the loss of the perceived benefit of having access to technology in the least expensive way.[103] Therefore, many developing countries oppose increasing intellectual property protection. However, studies[104] show that even though a developing nation stands to lose a sizable base of piracy and infringement revenue, the long term benefits[105] of having heightened intellectual property protection outweigh the short-term economic costs.[106] As a result, nations have recently shifted toward increased intellectual property protection and can attest to outweighing long term benefits.[107]

Developing countries advance other arguments against GATT efforts on intellectual property. Many developing countries initially advocated WIPO, not GATT, as the standard-setting arena for intellectual property. This bias for WIPO stems from the belief that it is a more sympathetic forum for developing countries.[108] In WIPO as in other United Nations agencies, each country has one vote and decisions are made by a simply majority.[109] The Third World's overwhelming majority in WIPO allows them to prescribe their views for the industrial world's minority bloc. By contrast, GATT decisions are typically made by consensus.[110] Developing countries are weary of GATT. They have characterized GATT as a "rich man's club," which serves the interests of developed countries only.[111] Kindled by the inherent imbalance of power

---

103. *Id.*

104. *See generally* GLOBAL CONSENSUS, *supra* note 50, at 105-07.

105. *New Threats, supra* note 2, at 4-5 (discussing many potential benefits for developing countries if intellectual property protection is improved).

106. GLOBAL CONSENSUS, *supra* note 50, at 90.

107. *Id.* at 107. In a study of seven developing countries, it was concluded that very moderate increases in growth rates (.07% to .2%) would be enough to offset the short term cost contributed to the piracy industry. *Id.*

108. Kastenmeier & Beier, *supra* note 51, at 292.

109. *New Threats, supra* note 2, at 8.

110. *Id.*

111. GLOBAL CONSENSUS, *supra* note 50, at 47. Much of this attitude comes from work dating back to the early 1960s and the emergence of the U.N. Conference on Trade and Development (UNCTAD). UNCTAD, after studying the Kennedy Round, asserted that developing countries lack the bargaining power to negotiate concessions of interest to them and that consequently their interests

between industrialized countries and developing countries, developing countries assert that they lack the bargaining power to negotiate and that consequently their interests are not adequately reflected in the results.[112] On the other hand, the variety of topics involved in the Uruguay Round offer developing countries a variety of meaningful negotiating tools.

Despite their reluctance to support intellectual property protection in GATT, developing countries have the largest stake in the future of the international trading system. Because their economies depend greatly upon the openness on international markets, these countries' overriding objective is to maintain and strengthen the multilateral trading system.[113] Faced with industrialized countries tending to pursue a protectionist strategy when confronted with rapid shifts in comparative advantage, especially in period of economic uncertainty, developing nations have little choice but to participate in finding a GATT-intellectual property protection solution.[114] Developing countries, which prefer increased market access for their exports, must meet the challenge of GATT negotiations.[115] The alternative is the "law of the jungle" effect of unilateral and bilateral movements.[116]

---

were not adequately reflected in the results. *Id.*

112. Around the time of the December 1990 meeting, criticism was voiced about the lack of attention paid by industrialized countries to Third World Concerns. The non-governmental organizations (NGO) from 27 countries denounced the manner in which negotiations have been conducted, while attending the Uruguay Rounds in Brussels. The NGO spokesperson commented that the trade talks did not deal with the effects of the "existing trading system on hunger, poverty, external debt and underdevelopment." *See* Oppewal, *GATT: NGO's Make Demands for Change*, Inter Press Service, (LEXIS, Nexis file) Dec. 3, 1990. *See also* GLOBAL CONSENSUS, *supra* note 50 at 47.

113. Koh, *supra* note 99, at 49.

114. Ricupero, *Trade and Technology: Issues at Stake for Developing Countries, reprinted in* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TECHNOLOGY, TRADE POLICY AND THE URUGUAY ROUND 187, 192 (1990).

115. *See supra* note 84. As noted above, the variety of topics involved in GATT Rounds, like agriculture and textiles, do offer developing countries a variety of meaningful tools.

116. A statement made by U.S. trade representative, Carla Hills. Azocar, Inter Press Service, Dec. 3, 1990 (LEXIS, Nexis file).

2. Developed Countries and GATT - A Code Proposal

Many member nations strongly support the introduction of a genuine Intellectual Property Protection-Code in GATT.[117] Developed countries, especially, find it in their best interest to create within the GATT framework a supplementary agreement liberalizing trade in accordance with tighter trade rules than those which would probably result in a GATT-wide resolution.[118] The European Community, Japan, and the U.S. support such an Intellectual Property Protection-Code.

The European, Japanese, and U.S. business communities created their own memorandum in support of an Intellectual Property Protection-Code. This joint memorandum contemplates protection of patents, trademarks, designs, copyrights, semiconductor chip layouts, and proprietary information.[119] This statement prudently addresses the proposed protection, its definition, accompanying rights, terms, use and enforcement procedures as well as the fundamental principle behind its inclusion.[120] The European, Japanese, and U.S. business communities set out three main

---

117. Ulrich, *GATT: Industrial Property Protection, Fair Trade and Development*, in GATT OR WIPO? NEW WAYS IN THE INTERNATIONAL PROTECTION OF INTELLECTUAL PROPERTY 127, 129 (Beier & Schricker ed. 1989).

> The most far-reaching proposal is that of the USA (GATT-Doc.MTN.GNG/NG11/W/14) since it extends to all important intellectual property rights, establishes a precise framework of protection more or less following the domestic law of the US and provides for trade sanctions, i.e. for compensatory and retaliatory withdrawal of trade concessions, imposition of tariffs and quota etc., in case these standards are not met by signatories . . .

Id.

> Japan's proposal (MTN.GNG/NG 11/W 17/Add 1 of 23 Sept. 1988) does not extend to trade secrets and is framed rather vaguely so as to allow for further negotiation. EEC-proposal of July 1988. (MTN.GNG/NG 11/W/25 of July 1988) attempts to cover all intellectual property rights, but would limit sanctions to "appropriate cases."

Id. at nn.2-3.

118. GATT PLUS, *supra* note 78, at 6.

119. The communities' memorandum, *Basic Framework of GATT Provisions on Intellectual Property*, summarizes the inadequate and ineffective protections of intellectual property, explains why the present international intellectual property regimes never intended to address these trade distortions, and then analyzes how the proposed GATT Provisions on Intellectual Property Provision can serve as a multilateral vehicle to substantially reduce these trade distortions. *See* Statement of Views, *supra* note 10, at 363.

120. *Id.* at 371-402.

objectives: To create an expeditious enforcement procedure under national intellectual property and trade laws so as to effectively deter the abuse of intellectual property rights; to encourage the adoption and implementation of adequate intellectual property laws; and to avoid creating barriers to legitimate trade.[121] The European, Japanese, and U.S. seek to achieve these main objectives by:

> First, in the event that an owner of intellectual property rights in a signatory country is faced with an infringing import, the owner would be able to stop the infringing import at the border of the signatory. Second, in the event that an owner of an intellectual property right in a signatory country is confronted with an infringing good that has been produced or created locally or abroad, the owner would be able to use judicial procedures to stop the infringement. Third, where such owners are unable to obtain redress because of a failure of the signatory country to carry out its obligations, their own government will be able to invoke the dispute resolution mechanisms of the GATT IPP [Intellectual Property Protection].[122]

The union of these three powerful communities is found to be quite impressive. However, GATT members need to realize that a GATT code may not be the most fulfilling solution to their intellectual property protection problems.

IV. MAKING A SUCCESSFUL SOLUTION

A. Demanding More Than a Code

The emphasis on a GATT code assumes that the code would facilitate negotiations and permit countries with a common interest in eliminating trade distortions caused by inadequate and ineffective intellectual property protection to enter expeditiously

121. *Id.* at 366.
122. *Id.*

into an agreement.[123] However, member nations should be wary of circumventing a GATT-wide result. After all, the hope of finding a comprehensive solution that included all parties fostered the new GATT focus on intellectual property protection. The purpose of including intellectual property in GATT was not for harmonized countries to establish a code merely in frustration of the opposition. The rationale that a code format provides parties with the opportunity to form a separate detailed agreement, even if it does not apply to all GATT members, only perpetuates the real problem at hand. It proves to exacerbate the allowance of unfair intellectual property practices. A code creates the same situation seen in the other conventions administered under WIPO: Allowing non-subscribing countries to disregard the protection rules.

The new approach to international intellectual property protection through GATT should not have the effect of aligning only industrialized countries' levels of protection. The laws of these countries are already similar, and bridging remaining differences between them is within the framework of the WIPO conference on world-wide harmonization.[124] The real and necessary purpose of a new GATT resolution should be to include the developing countries in the adherence to the standards of intellectual property protection. In this respect the European, Japanese, and U.S. proposals extend far beyond an attempt to overcome the deadlock into which the revision of the Paris Convention has run. Their joint proposal advances more than elementary adherence to minimum standards of intellectual property, which in itself would be a big step for some countries.[125]

B. Working Out a Real Solution

The industrialized countries have set forth a negotiating agenda that depends for its true success on the participation of developing countries in the final accords. Although ongoing trade liberalization

123. *Id.* at 365.
124. Ulrich, *supra* note 117, at 147.
125. *Id.*

carries great economic importance to developing countries, such developments do not erase the general mistrust of GATT negotiations. Consequently, developing countries which will have to forsake short-term economic costs of a "piracy"-based industry should not be the only concession makers. Industrialized countries must be willing to be flexible in order to meet the need of the developing countries and to eliminate the "rich man's club" perception. The developed countries, to persuade developing countries to make these changes, must prove that they are making equal, if not greater, concessions in the Uruguay Round. This may require revision of some of the traditional negotiating methods of GATT.

GATT, with its procedure of reciprocal bargaining and concessions, is clearly unsatisfactory to developing countries which constitute a majority of the GATT membership.[126] Both developed and developing countries should realize that the traditional conduct of GATT negotiations in terms of multilateral reciprocity is outdated. GATT should be seeking a mutually advantageous balance of legal rights and obligations.[127] A proper consideration of the concerns and preoccupations of developed countries, in terms of diminishing the frustrations of economic return, and developing countries, in terms of their national interest and developmental needs, is indispensable for further advancement of the negotiating process.[128]

V. CONCLUSION

While developed countries battle to maintain their comparative advantages and their prosperous economies, developing countries continue their struggle to develop and secure open markets for their exports. However, a growing appreciation that the patterns of global trade are increasingly determined by the standards of

126. SIMMONDS & HILL, *supra* note 63, at 3-4.

127. *Id.* at 39.

128. Ricupero, *Trade and Technology: Issues at Stake for Developing Countries, reprinted in* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TECHNOLOGY, TRADE POLICY AND THE URUGUAY ROUND 187, 197 (1990).

intellectual property protection brings the developed and developing countries worlds together. The focus on protection extends well beyond the inefficiencies of intellectual property to the effects on international trade flows. Developed countries claim that an increase in protectionist measures are necessary to prevent others from producing dubious products at cheaper prices and cheating inventors and developers of their fair returns. These countries blame the alleged trade unfairness on the inadequacies of intellectual property protections.

Frustrated with attempts to improve municipal laws, customs laws, and existing treaties like the Paris Convention, countries have turned their efforts to the General Agreement on Tariffs and Trade. Since GATT is the international body of law that purportedly guarantees fair and free trade for all signatories, countries welcome GATT as a forum for a discussion on the elimination of distortion in intellectual property trade. Although developing countries have been reluctant to admit that intellectual property is a "good" so as to deserve laws, many have now joined in the current GATT endeavor after recognizing that the growing alternatives of unilateral and bilateral actions leave them at a great disadvantage, since they have a limited voice.

Thus, the challenge of the Uruguay Round has been to bring together the forum and rules governing international trade under GATT and the intellectual property norms that have evolved through the series of international WIPO agreements. To reach a successful solution, the efforts must also balance the needs and considerations of both developed and developing countries. An intellectual property agreement that fails to include all signatories only perpetuates the existing problems of distorted trade. A full agreement on an intellectual property proposal is necessary.

Achieving this requires a re-evaluation of the traditional negotiating methods of GATT. Developing countries, already entering GATT with great skepticism, need assurance that their voices will be heard. New manners of negotiations and some adjustments are necessary to gain their confidence in the system. GATT members must work out a combination of trust and trade-

offs if they intend to achieve a true solution, acceptable to all signatories, to the trade-related problems of intellectual property.

Jean M. Dettmann